

No. 12,534

IN THE
United States Court of Appeals
For the Ninth Circuit

WINSTON CHURCHILL HENRY,	}
Appellant,	
VS.	
UNITED STATES OF AMERICA,	}
Appellee.	

APPELLANT'S PETITION FOR A REHEARING
and
MOTION TO STAY MANDATE.

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UNITED STATES OF AMERICA,		

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable United States Court of Appeals for
the Ninth Circuit:*

The appellant, Winston Churchill Henry, respectfully petitions for a rehearing in the above entitled cause. The grounds urged are these:

1. The court erred in approving the ruling of the lower court denying appellant's motion to strike the testimony of government witnesses relating to incriminatory acts of, and conversations with, the appellant after service of the search warrant, which motion was based on the ground that appellant was under illegal restraint after such service and not acting freely and voluntarily.

2. The court erred in failing to hold that the lower court erred to the prejudice of appellant, and appellant was denied a fair trial, by the lower court denying the request of the jury during its deliberation for a transcript of the instructions given, and by giving in lieu thereof a new and superseding jury charge wherein the bounds of proper comment by the court were exceeded.

1. THE COURT ERRED IN APPROVING THE RULING OF THE LOWER COURT DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF GOVERNMENT WITNESSES RELATING TO INCRIMINATORY ACTS OF, AND CONVERSATIONS WITH, THE APPELLANT AFTER SERVICE OF THE SEARCH WARRANT, WHICH MOTION WAS BASED ON THE GROUND THAT APPELLANT WAS UNDER ILLEGAL RESTRAINT AFTER SUCH SERVICE AND NOT ACTING FREELY AND VOLUNTARILY.

In its opinion this court deemed it significant that the record did not show when appellant was first taken before a commissioner. It is quite true that the record does not disclose that fact. But the record very definitely shows the illegal restraint of which appellant complained. It shows that he was placed under arrest by narcotic agent Wells around 1 o'clock p.m. of July 16, 1949 (T 384); that appellant "was obliged to go along with Mr. Wells" wherever Wells went on the premises during the course of the raid (T 329) and was interrogated during all that time; that appellant was kept at the premises until after 3 o'clock p.m. (T 270) and was then taken directly to the police station where interrogation still persisted around 5 p.m. (T 367, 412). It is unreasonable to suppose that

he was taken before a commissioner on July 16, 1949, after 5 p.m. At the oral argument the statement was made that he was not taken before a commissioner until the morning of July 17, 1949, and counsel for appellee did not challenge the statement. But by 5 p.m. of July 16, 1949, the illegal restraint of which appellant complains had fully occurred. Such facts bring the present case squarely within the condemnation of *Upshaw v. United States*, 335 U.S. 410, 411-414, 69 S. Ct. 170, 93 L.Ed. 100. That case is plain authority for the rule that legal arrest ends where illegal restraint or detention begins. That rule is applicable here. Appellant respectfully urges that a rehearing be granted in order that such rule be further considered and applied.

2. THE COURT ERRED IN FAILING TO HOLD THAT THE LOWER COURT ERRED TO THE PREJUDICE OF APPELLANT, AND APPELLANT WAS DENIED A FAIR TRIAL, BY THE LOWER COURT DENYING THE REQUEST OF THE JURY DURING ITS DELIBERATION FOR A TRANSCRIPT OF THE INSTRUCTIONS GIVEN, AND BY GIVING IN LIEU THEREOF A NEW AND SUPERSEDING JURY CHARGE WHEREIN THE BOUNDS OF PROPER COMMENT BY THE COURT WERE EXCEEDED.

In its opinion this court deemed it significant and determinative that the lower court told the jury several times that it was the ultimate judges of the facts. Such admonition has never been held adequate to excuse partisan comments by a trial judge or justify him in exceeding the bounds of proper comment. (*Quercia v. United States*, 289 U.S. 466, 468-472, 53

S.Ct. 698, 699-700, 77 L.Ed. 132; *Starr v. United States*, 153 U.S. 614, 14 S.Ct. 919, 923-924, 38 L.Ed. 841; *Cal-Bay Corporation v. United States*, 9 Cir. 169 F.2d 15, 22-23; *United States v. Marzano*, 2 Cir. 149 F. 2d 923, 926; *Musick v. United States*, 6 Cir. 2 F. 2d 710, 711; *Hobart v. United States*, 6 Cir. 299 F. 784, 785.) Here in the jury charge in commenting on the facts the trial judge gave to the case of the prosecution more than its maximum strength and to the case of the defendant less than its minimum strength. A fair trial demands something better, and appellant did not receive it. It is therefore respectfully urged that a rehearing should be granted in order that the rule of the cited cases be further considered and applied.

Wherefore it is respectfully submitted that a rehearing should be granted.

Dated, San Francisco,
February 9, 1951.

SAMUEL LANDAU,
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*Attorneys for Appellant
and Petitioner.*

HERBERT CHAMBERLIN,
Of Counsel.

CERTIFICATE OF COUNSEL.

The undersigned, one of the counsel for appellant and petitioner in the above entitled cause, hereby certifies in his judgment the foregoing petition for a rehearing is well founded, in both law and fact, and that it is not interposed for delay.

Dated, San Francisco,
February 9, 1951.

HERBERT CHAMBERLIN,
*Counsel for Appellant
and Petitioner.*



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MOTION TO STAY MANDATE.

*To the Honorable United States Court of Appeals for
the Ninth Circuit:*

The appellant, Winston Churchill Henry, in the above entitled cause, hereby respectfully moves this Court, in the event that his Petition for Rehearing, filed herewith be denied, for an order staying the issuance of the mandate in said cause for a period of thirty (30) days after denial of said Petition, in order to allow appellant to prepare and file a Petition for Writ of Certiorari in the office of the Clerk of the Supreme Court of the United States, and thereafter, until such time as the said Petition for Writ of

Certiorari may be granted or denied and, if granted, until the final determination of the cause.

Dated, San Francisco,
February 9, 1951.

SAMUEL LANDAU,
W. Z. FAIRBANKS,
LANDAU & FAIRBANKS,
O. P. SOARES,
Attorneys for Appellant.

HERBERT CHAMBERLIN,
Of Counsel.